

Hearing:
August 5, 1999

Paper No. 14
Bottorff

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 24, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Verrerie Cristallerie d'Arques, J.G. Durand et Cie

Serial No. 75/133,220

Victoria J.B. Doyle of Fitzpatrick Cella Harper & Scinto
for Verrerie Cristallerie d'Arques, J.G. Durand et Cie

Rebecca Gilbert, Trademark Examining Attorney, Law Office
113 (Odette Bonnet, Acting Managing Attorney)

Before Quinn, Walters and Bottorff, Administrative
Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark CHEERS !!! (in typed form), for goods
identified in the application as "beer mugs."¹

The Trademark Examining Attorney has refused
registration under Trademark Act Section 2(d), 15 U.S.C.

¹ Serial No. 75/133,220, filed July 12, 1996, based on use in
commerce. Applicant alleges January 25, 1996 as the date of
first use of the mark anywhere and the date of first use of the
mark in commerce.

§1052(d), on the ground that applicant's mark, when used on applicant's goods, so resembles the mark depicted below

which is registered for "beverageware; namely, drinking glasses, mug coffee cups and shot glasses"² as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, applicant appealed. Applicant and the Trademark Examining Attorney have filed main briefs, and applicant has filed a reply brief. An oral hearing was held, at which applicant's counsel and the Trademark Examining Attorney were present.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods*,

² Registration No. 1,674,277, issued February 4, 1992. Combined Section 8 and 15 affidavit accepted and acknowledged.

Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We find that the goods identified in the application, i.e., "beer mugs," are subsumed within, and thus legally identical to, the "drinking glasses" identified in the cited registration. Furthermore, in the absence of any express limitations in either applicant's or registrant's identification of goods, we also presume that applicant's goods and registrant's goods move in the same trade channels and that they are marketed to and purchased by the same classes of customers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

We also find that applicant's mark is confusingly similar to the cited registered mark. Because applicant's goods are legally identical to registrant's goods, the degree of similarity between the marks that is required to support a finding of likelihood of confusion is less than would be required if the respective goods were more disparate. See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions

that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than others, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). We find that the dominant feature in the commercial impression created by the registered mark is the word CHEERS. That word occupies the visual center of the registered mark, and is depicted in a much larger typeface than the other wording in the mark. That other wording, i.e., "MEET ME IN," directly refers to and reinforces the dominant significance of the word CHEERS. The circular design element of the registered mark serves merely as the background or carrier for the dominant word CHEERS.

Applicant argues that the word CHEERS is weak and highly suggestive as applied to the beverageware goods identified in the application and in the registration, and

that the presence of CHEERS in both marks accordingly is not a sufficient basis for finding the marks to be confusingly similar, especially in view of the points of dissimilarity between the marks in terms of their appearance, sound, and connotation. We disagree. Although we take judicial notice that the word "cheers" is "used as a toast," see Webster's Ninth New Collegiate Dictionary (1990) at 230, we cannot conclude that the word CHEERS, as it appears in the registered mark, is so weak or highly suggestive that applicant's use of the same word as its mark for identical goods would not be likely to cause confusion. We note that there is no evidence in the record of any third-party use of marks containing the word CHEERS;³ this case thus is distinguishable from the case repeatedly cited by applicant, i.e., *First Sav. Bank F.S.B. v. First Bank System Inc.*, 101 F.3d 645, 40 USPQ2d 1865 (10th Cir. 1996).

³ In its response to the initial Office action refusing registration and again in its appeal brief, applicant has relied on the asserted existence of various third-party registrations of marks containing the word CHEERS, arguing that such registrations were evidence of the weakness of the word CHEERS. At the oral hearing, applicant's counsel retreated somewhat, asserting that applicant was relying on these registrations not as evidence of third-party use of the registered marks, but as evidence of how the owners of those registrations view the meaning of the word CHEERS. However, as noted by the Trademark Examining Attorney, applicant did not properly make those third-party registrations of record, and we therefore have given them no evidentiary

Nor can we agree with applicant that the various distinctions between the marks, as identified by applicant, are sufficient to render the marks dissimilar for likelihood of confusion purposes. Because applicant has applied to register its mark in typed form, applicant may not rely on the fact that the registered mark depicts the word CHEERS in a different, cursive script. As stated by our primary reviewing court, ". . . the argument concerning a difference in type style is not viable where one party asserts rights in no particular display. By presenting its mark merely in a typed drawing, a *difference* cannot legally be asserted by that party." *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 at 939 (Fed. Cir. 1983) (emphasis in original). Applicant's registration of its mark in typed format would give applicant rights to the mark in all normal and reasonable manners of presentation, including the cursive script depicted in the registered mark. See *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233, 1235-36 (TTAB 1992).

As for the other points of dissimilarity identified by applicant, we find that the presence in the registered mark of the words "MEET ME IN" and the background carrier design

consideration whatsoever. See *In re Duofold, Inc.*, 184 USPQ 638 (TTAB 1974).

does not suffice to distinguish the marks. As discussed above, in the commercial impression created by the registered mark, those elements of the mark are clearly subordinate to and in support of the dominant word CHEERS.

In short, the similarity between the marks arising from their shared use of the word CHEERS more than outweighs any superficial differences between the marks. We find that the marks, as applied to the legally identical goods involved in this case, are confusingly similar, and that confusion is likely to result from contemporaneous use of the marks. Moreover, even if we had any doubts as to whether a likelihood of confusion exists (we do not), such doubts must be resolved against applicant and in favor of registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal to register is affirmed.

T. J. Quinn

C. E. Walters

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board